

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

60328

FILE: B-184759

DATE: December 24, 1975

MATTER OF: Burley Machinery, Inc.

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DIGEST:

Printed legend on descriptive data sheets submitted with bid that product specifications set forth in data sheets are subject to change without notice may be ignored in evaluating bid under brand name or equal clause since bid, read as a whole, indicates bidder's intention to furnish from stock product conforming to specifications. Effect of legend by manufacturer of equipment is to reserve right to make changes as to its items produced in future.

Invitation for bids (IFB) DAAA22-75-B-0011 was issued on May 28, 1975, by the Watervliet Arsenal, Watervliet, New York, to procure a snow removal unit on the basis of a "Caterpillar Loader, Model 920 or equal" with specified attachments. Two bids were received in response to the IFB including the bid submitted by Burley Machinery, Incorporated (Burley), a regular dealer, who offered the Clark Equipment Company (Clark) Model 45B, and related attachments of other manufacture, as equal to the brand name model. However, it is reported that all bids were rejected as nonresponsive because of qualifying language contained in the accompanying descriptive literature.

The IFB contained the standard Brand Name or Equal clause prescribed by Armed Services Procurement Regulation 1-1206.3(b) (1974 ed.), which requires bidders proposing to furnish an "equal" product to furnish with the bid descriptive material to enable the purchasing activity to determine whether the product offered meets the salient characteristics of the IFB and to establish exactly what the bidder proposes to furnish. The Clark data sheets, submitted as part of the descriptive literature with Burley's bid, contained the statement: "Materials and Specifications Subject to Change Without Notice or Obligation." However, Burley contends that the cover letter transmitting its bid, in effect, negates the legend contained in the descriptive literature. Specifically, the protester relies on the statement contained in its cover letter that its bid met the specifications in every respect, that delivery of the "equal" unit would be

from stock in its inventory and that the loader and snowblower were in inventory and available for inspection. The protester contends that the overall offer to comply with the specifications and to furnish equipment in stock and ready for delivery supersedes the qualification in the descriptive literature. Burley also questions whether the cancellation of the solicitation was in fact in the best interests of the Government and made in good faith.

The responsiveness of a bid submitted under a brand name or equal purchase description depends not on whether the bidder believes, or even knows, that his proposed product is equal to the brand name but whether the procuring activity can determine that fact from the information submitted with the bid. Since the IFB's brand name or equal clause clearly warned bidders that the "equality" of the product would be determined on the basis of information furnished by the bidder, the issue in the instant protest is whether the descriptive literature, specifically the Clark data sheets containing the above-quoted pre-printed reservation, precluded the contracting agency from determining that Burley will furnish a product meeting the needs of the Government.

For the reasons that follow, it is our conclusion that the original solicitation should be reinstated and the award made to Burley, if its bid is otherwise responsive.

In reporting on the rejection of Burley's bid, the procuring activity cites our ruling in Big Joe Manufacturing Company, B-182063, November 14, 1974, 74-2 CPD 263, which held that inclusion of statements in descriptive literature to the effect that the production specifications are subject to change without notice provide a bidder with an option to deviate from the advertised specifications after award and is a material deviation requiring bid rejection. We have reviewed the case and believe that it should be distinguished from the facts and circumstances of the instant protest. In Big Joe, supra, the solicitation similarly required that bidders offering "equal products" submit descriptive literature for evaluation purposes. The bidder offered its own product, and its descriptive literature contained virtually an identical pre-printed legend accompanied by a statement in the bid form that "We are quoting in full compliance with the specifications." In denying Big Joe's protest, we stated in pertinent part:

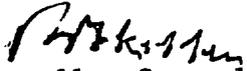
"We do not believe that the blanket offer to comply with the specifications cures this deviation since the descriptive literature was required for the purpose of determining what the Government was binding itself to purchase. See B-158808, May 12, 1966. The legend on the descriptive literature, at the very least, makes the protester's bid ambiguous since it can be argued that either (1) the legend gives the protester an option to deviate from the specifications, or (2) that the protester is bound by its statement on the form. Consequently, the Government cannot be sure what it is binding itself to purchase. Cf. Arista Company, 53 Comp. Gen. 499 (1974). Looking at the bid, which includes the descriptive literature, there is no way of being certain that the protester didn't mean that it reserved the right to change specifications regardless of any other statements in the bid and it cannot clarify this ambiguity subsequent to bid opening."

In addition, we stated in the Arista case, supra, that generally a qualifying legend is a material deviation requiring bid rejection where descriptive data is necessary to establish exactly what the bidder proposes to furnish. However, we think that the pertinent language of the bid should be read as a whole. In that light, we believe the reasonable interpretation of Burley's bid to be that it offered to furnish from stock items which fully comply with the specifications but that the manufacturer of the equipment reserved the right to make changes without notice in such items which it might produce in the future.

Therefore, we believe that Burley's bid should not have been rejected for the reason stated by the agency. Since the IFB was canceled as a result of an erroneous determination of nonresponsiveness, no "cogent or compelling reason" presently exists to allow the cancellation to stand. See 52 Comp. Gen. 285 (1972). Our Office has sanctioned the reinstatement of a canceled invitation in the past when to do so would work no prejudice on the rights of others and would, in fact, promote the integrity of the public bidding system. 39 Comp. Gen. 834 (1960); 54 Comp. Gen. 237 (1974), 74-2 CPD 183; 54 Comp. Gen. 145 (1974), 74-2 CPD 121.

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Under the circumstances, we recommend reinstatement of the invitation and award to Burley, if otherwise responsive.


Deputy Comptroller General
of the United States